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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SPRENGER, OLSON & SHUTES, P.A.
and DAVIS, MINER, BARNHILL & GALLAND,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	PAGE
PETITIONERS' REPLY BRIEF	1
CONCLUSION	4

TABLE OF AUTHORITIES

Aronson v. Board of Trade, 372 F.Supp. 1349 (N.D. Ill. 1974)	4
EEOC v. Burlington Northern, Inc., 618 F.Supp. 1046	5
In re Cenco Securities Litigation, 519 F.Supp. 322 (N.D. Ill. 1981)	4
In re Corrugated Container, 1983-2 Trade Cases ¶ 69,628 (S.D. Tex. 1983)	4
Keith v. Volpe, 501 F.Supp. 403 (C.D. Cal. 1980) .	4
Municipal Authority of Bloomsburg v. Pennsylvania, 527 F.Supp. 982 (M.D. Pa. 1982)	4
Pacific Plumbing Supply Co. v. Crane Co., 1982-1 Trade Cases ¶ 64,473 (W.D. Wash. 1982) ...	4
Pennsylvania v. Delaware Valley Citizens Council For Clean Air, 55 U.S.L.W. 5113 (June 13, 1987)	4, 5
Rajender v. University of Minnesota, 546 F.Supp. 158 (D. Minn. 1982)	4
Vacchione v. Wohlgemuth, 481 F.Supp. 776 (E.D. Pa. 1979)	4

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PETITIONERS' REPLY BRIEF

With the exception of one statement by Burlington Northern ("BN"), all of the matters discussed in BN's Brief in Opposition to the Petition for Certiorari have been fully treated in the Supplement to Petition for Writ of Certiorari. The one matter not addressed in the Supplement is BN's misleading implication that it introduced evidence in the district court on the issue of whether a fee enhancement to compensate for risk was necessary to attract competent counsel to take this case. (BN Opp. 11)

It is false for BN to suggest that it introduced *any* evidence to refute petitioners' showing that plaintiffs could not obtain competent counsel "in the market" without the

prospect of an enhanced fee. Not only did BN fail to introduce any evidence of its own, BN did not challenge the evidence presented by petitioners. There was simply no conflicting evidence on this point for the lower courts to assess, and petitioners are not urging this Court to review any factual finding that was supported by any evidence in the record.[1]

The uncontroverted evidence offered by petitioners included the testimony of leading civil rights lawyers and economic experts who stated that without the availability of sufficient risk enhancement of fees, *this case would not have been brought.* The affidavits of Professor (now Judge) Frank Easterbrook, Julius Chambers, John E. Jacob, Bruce Elfvin, and Barrington D. Parker, Jr., which were introduced into evidence by petitioners at the fee hearing, stood uncontradicted by BN.[2] Thomas Sullivan and Professor Herbert Hill testified in detail at the fees hearing from their own experience in civil rights litigation to the necessity of fee enhancements to secure counsel for a case like this one. (Transcript of Proceedings 76-83, 94-97, 106-07) Neither witness was even cross-examined by BN on this subject.

BN presented nothing to rebut petitioners' economic evidence on the need for a fee enhancement. Indeed, BN chose not to use its own economic expert, Professor Steven

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[1] BN represents (BN Opp. 8 n. 12) that it offered substantial rebutting evidence below which is summarized at pp. 26-37 of its appellate brief. The pages cited contain only conclusory references to the strong evidence of discrimination uncovered by petitioners, EEOC's presence in the case, and the supposedly significant chance of settlement in a case fought to the day of trial.

[2] BN conducted extensive discovery with respect to petitioners' fee request, including the depositions of Professor Easterbrook, Thomas Sullivan, Bruce Elfvin, and Professor Hill.

Shavell, because he agreed with Professor Easterbrook that enhanced fees are essential if the civil rights laws are to be enforced through private litigation. Ironically, petitioners—over BN's objection that such economic evidence was irrelevant (Transcript of Proceedings 353-355)—introduced Professor Shavell's deposition testimony at the fee hearing to corroborate the Easterbrook testimony.

The only circumstance cited by the district court for its feeling that risk enhancement of fees was not necessary to attract competent counsel was the fact that certain other attorneys had brought individual Title VII actions against BN around the time this case was brought.[3] This "finding" by the district court is the only thing in the record BN can now cite to uphold the decisions of the lower courts. (BN Opp. 11)

The fact, however, that other attorneys filed complaints against BN proves absolutely nothing, for three reasons. First, the other actions were brought for individual employees and involved none of the problems or risks associated with representation of the broad classes for which petitioners sought relief. Second, as BN itself brought out below, the evidence was uncontroverted that these tag-along counsel simply rode in petitioners' wake and contributed nothing—neither legal services nor costs—toward prosecution of the case.[4] Finally, at the time these cases

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[3] The district court also relied upon its belief, which was not supported by any evidence offered at the hearing, that the history of the struggle for equality demonstrates that attorneys will come forward to represent plaintiffs in civil rights cases without fee enhancement. BN's Opposition does not even attempt to support this ground for rejecting petitioners' showing.

[4] *Burlington Northern's Preliminary Response to the Fees and Expense Petition of: Jarve Garrett and Fishman Legal Services*, filed July 13, 1984, p. 20.

were brought against BN in 1978, the law strongly supported risk multipliers, very large multipliers were given in a number of cases, and attorneys reasonably believed they would be compensated for undertaking risk in contingent cases if they won.[5] Obviously, one cannot use the behavior of attorneys who expected to be compensated for risk to show that attorneys would have brought this case even if it was clear that no fee enhancement for risk would be available.

CONCLUSION

BN attempts to minimize the factors in this case that compel some fee enhancement under the standards set in *Pennsylvania v. Delaware Valley Citizens Council For Clean Air*, 55 U.S.L.W. 5113 (June 13, 1987). But BN can point to no evidence in the record contrary to petitioners' showing that plaintiffs would have faced insuperable difficulties in finding competent counsel in the relevant market

[5] Examples of cases giving high multipliers in the period in which these cases were filed are: *Vacchione v. Wohlgemuth*, 481 F.Supp. 776 (E.D. Pa. 1979) (multiplier of 2.0 in civil rights case); *Aronson v. Board of Trade*, 372 F.Supp. 1349 (N.D. Ill. 1974) (multiplier of 4.0). Courts continued to grant substantial multipliers in the 1980s. *See, e.g., In re Corrugated Container*, 1983-2 Trade Cases ¶ 69,628 (S.D. Tex. 1983) (multipliers of 3.5 and 4.0); *Rajender v. University of Minnesota*, 546 F.Supp. 158 (D. Minn. 1982) (multiplier of 3.0 in Title VII case); *Municipal Authority of Bloomsburg v. Pennsylvania*, 527 F.Supp. 982 (M.D. Pa. 1982) (multiplier of 4.5); *Pacific Plumbing Supply Co. v. Crane Co.*, 1982-1 Trade Cases ¶ 64,473 (W.D. Wash. 1982) (multiplier of 3.0); *In re Cenco Securities Litigation*, 519 F.Supp. 322, 327 (N.D. Ill. 1981) (multiplier of 4.0 awarded to lead counsel); *Keith v. Volpe*, 501 F.Supp. 403 (C.D. Cal. 1980) (multiplier of 3.0 in civil rights case).

without the expectation that a fee enhancement would be paid to compensate for risk. The unequivocal and uncontradicted testimony of the witnesses called by petitioners on this point was reinforced by the following critical facts that BN cannot dispute:

(i) Petitioners were completely dependent on winning the case to receive any fee and reimbursement of $1 million in expenses.

(ii) Petitioners could not in this class action make any arrangements with their clients that would compensate them for undertaking risk.

(iii) This was a very risky case.

(iv) Petitioners were granted no fee enhancement to compensate for risk. Instead they were paid only the hourly rates which are "paid to comparable attorneys in the relevant community" for non-contingent, risk-free legal work. *EEOC v. Burlington Northern, Inc.*, 618 F.Supp. 1046, 1055.

In light of this Court's decision in *Delaware Valley*, and the failure of the lower courts to analyze the issue of compensation under the proper standards, petitioners respectfully request that the Petition be granted and the decision of the Seventh Circuit be reversed.

Respectfully submitted,

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Dated: August 3, 1987

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